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No. 88-991

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

U.S. Roofing Corporation,

Petitioner

v.

Owens-Corning Fiberglas Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Are Intervenors parties to the cases to which they have been accepted, with full and ordinary appeal rights as normally constrained by the Article Three and legal precedent?

2. Is an Intervenor that is accepted as a party to a case that had its initial origin in Anti-trust law, to be barred from seeking the appeal of a lower court decision as if it were an outsider?

LIST OF PARTIES

The parties to the proceedings below were:

1. The Federal Trade Commission, plaintiff,

2. U.S. Roofing Corporation, intervenor-appellant,

and

3. Owens-Corning Fiberglas Corporation,

defendant-appellee.

STATEMENT OF AFFILIATIONS

U.S. Roofing Corporation is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to this case, that has a financial interest in the outcome.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

LIST OF PARTIES..... ii

STATEMENT OF AFFILIATIONS..... iii

AUTHORITIES..... vi

OPINIONS BELOW..... 2

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS AND STATUTES..... 3

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT

I. **THE ORDER OF THE COURT OF APPEALS DISENFRANCHISES AN ENTIRE CLASS OF LITIGANT: THE INTERVENOR**..... 8

II. **A VALUABLE MECHANISM FOR RESOLVING SITUATIONS OF NON-COMPLIANCE WITH CONSENT ORDERS HAS BEEN INJURED BY AN UNREPENTANT DEFENDANT AND THE MISINTERPRETATION OF INTERVENOR STATUS**..... 10

III. **THE PRELIMINARY INJUNCTION IS AN UNSANCTIONED DEPARTURE IN CONFLICT WITH DECISIONS OF THE SUPREME COURT**..... 11

CONCLUSION..... 12

APPENDICES
(in reverse order of occurrence)

APPENDIX A - APPEALS COURT RULING

APPENDIX B - F.T.C. STATEMENT

APPENDIX C - TOLEDO DISTRICT COURT DE NOVO RULING

APPENDIX D - TOLEDO DISTRICT COURT INTERIM RULING

APPENDIX E - AKRON DISTRICT COURT RULING GRANTING EXTENSION TO COMPLETE NEGOTIATIONS

APPENDIX F - FINAL JUDGMENT (2ND CONSENT DECREE)

APPENDIX G - F.T.C. COMPLAINT AND CONSENT JUDGMENT

AUTHORITIES CITED

Cases:

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975) 21

Cerro Metal Prods. v. Marshall, 620 F.2d 964,969 (3d Cir.1980).. 29

Diamond v. Williams, 106 S.Ct. 1697 (1986)..... 23

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946)..... 29

In the Matter of First Colonial Corp. of America, 544 F.2d 1291 (5th Cir. 1977), cert denied 97 S.Ct.1696..... 29

Klein v. Nu-Way Shoe Co., 136 F.2d 986 (2d Cir.1943)..... 29

SEC v. U.S. Realty & Improvement Co., 60 S.Ct. 1044 (1940)..... 29

Statutes:

15 U.S.C. 18..... 7

15 U.S.C. 45..... 2,5,7,9

28 U.S.C. 1254 (1)..... 4

F.R.Civ.P. 19..... 19

F.R.Civ.P. 23..... 19

F.R.Civ.P. 24.....
3,4,5,18,23,28,29

The United States Constitution:

Article III Sec 2 cl 1..... 3

Also: Wright, Miller & Kane,
Federal Practice and Procedure :
Civil 2d Sec. 1920, Sec. 1923. 11,12

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

U.S.ROOFING CORPORATION,
Petitioner

v.

OWENS-CORNING FIBERGLAS CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

U.S. Roofing Corporation, the petitioner, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Sixth Circuit entered herein November 2, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported as 853 F.2d 458 (6th Cir. 1988). The opinion of the District Court (Appendix C) is unreported.

JURISDICTION

The jurisdiction of the federal courts was initially invoked in this case by the Federal Trade Commission pursuant to 15 U.S.C. Sec. 45(1). The defendant, Owens-Corning, had failed to comply with a consent decree which was an order of the commission, No. C-3061, 97 F.T.C. 249 (1981) (Appendix G). In Federal District Court, a second consent decree,

termed Final Judgement (Appendix F), was entered which engaged an independent trustee, as agent of the court, to sell the plants which were the source of non-compliance.

U.S. Roofing was selected as the preferred bidder by the Trustee. A contract was entered into to sell the plants to U.S. Roofing that was conditional upon approval of the F.T.C. and, if requested by the defendant, the de novo review of the district court (Appendix F at 10).

U.S. Roofing applied for (and was granted by the district court) Intervenor status twice: the first time for limited purpose under F.R.Civ.P. 24(a)(2), the second without limitation under F.R.Civ.P. 24(b)(2).

The F.T.C. approved of the sale to U.S. Roofing. The district judge disapproved. The F.T.C., though later calling this ruling "erroneous" did not seek reversal through

appeal. This left U.S. Roofing harmed and, through its status under Rule 24, it filed an appeal in the Sixth Circuit Court.

The defendant-appellee filed a motion for dismissal on the grounds that the intervenor-appellant had no jurisdiction. The appeals court ruled in favor of the motion (Appendix A).

The petitioner now seeks a reversal of that ruling through the jurisdiction of the Supreme Court pursuant to 28 U.S.C. Sec. 1254(1).

CONSITUTIONAL PROVISION and STATUTES

The United States Constitution,
Article III, Section 2 [1.]

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be make, under their Authority;-to all cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies between two or more States;-between a State

and Citizens of another State;-between Citizens of different States,-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

15 USCS Sec. 45 (l)

Civil penalty for violation of order. Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

F.R.Civ.P. 24(b)(2)

Permissive Intervention. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant's claim or defense and the main

action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT OF THE CASE

Owens-Corning Fiberglas Corp. (Toledo, Ohio) purchased a competitor, the Lloyd A. Fry Roofing Co. on April 20, 1977. Both companies produced asphalt shingles for the new home and reroof markets in the Western states.

The following week, the Federal Trade commission (F.T.C.) began an investigation which lead to the simultaneous filing of a complaint and consent order on March 30, 1981 (Appendix G). The complaint cited Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

The consent order presumably resolved this case. The order stated that Owens-Corning

would sell four of the twenty-four Fry roofing plants within two years. Owens-Corning was not required to sell any of the adjacent asphalt refineries or felt mills.[1]

Owens-Corning did not sell the plants. In an elaborate but unsuccessful hoax, it made a great show of "trying" to do so. The asking price was the key, both to keeping the plants unsold through this unproductive process and understanding the truth of the matter in retrospect: Initially, Owens-Corning asked five times gross book value[2]. During the final few weeks, an "auction" was held. The minimum acceptable bid was set by Owens-Corning at twice gross book value. As a

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[1]Shingles are produced by saturating/coating a mat (of glass fiber or paper felt) with asphalt, sprinkling colored granules on the top and cutting to shape.

[2]Gross book value is the undepreciated cost of assets, the purchase price.

consequence, there were no bidders.

Owens-Corning then petitioned the F.T.C. to reopen the Consent Decree, but the F.T.C. refused and brought an action for civil penalties against Owens-Corning in district court pursuant to 15 U.S.C. Sec. 45(1).

It is from this action, not the antitrust complaint entered by the F.T.C., that the present case directly arises.

A second Consent Order (the Final Judgement, July 27, 1984, Appendix F) was entered in district court for the Northern District of Ohio, Western Division, Judge Nicholas Walinski presiding. The Final Judgment provided that: a) Owens-Corning would pay a Civil Penalty of $800,000., b) an independent Trustee would be empowered to sell the plants, c) the Trustee would submit the best bid or bids to the Federal Trade commission for

review, and d) the defendant, Owens-Corning, could request a de novo review in district court at which both litigants would stand as equals (that is, the presumption of expertise normally awarded the F.T.C. would not be in effect).

The term of the Trust was nine months, with provision for a thirty-day extension if the Trustee felt it was necessary to complete on-going negotiations.

George Brown, a practicing experimental management scientist[3] formed U.S. Roofing

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[3]Management science is the study of the structure and function of corporations and other organizations of people. Experimental management science seeks to test new ways of making these organizations operate more efficiently. Unfortunately, there has never been a laboratory for this entire field of science; moreover the science is hampered by the proprietary nature of the data it works with. Mr. Brown sought the plants to create such a lab. His background is as follows: he attended the Massachusetts Institute of Technology and the Wharton Graduate School of Business. He has been a management consultant

Corporation which entered a bid for the plants, the better of two received by the Trustee. The bid was to purchase for cash the two plants with an option to buy the other two.[4]

The Trustee applied to Judge Walinski for a thirty-day extension (see Appendix F at 8) to complete on-going negotiations with U.S. Roofing. Owens-Corning objected. Judge Walinski was not available. The case was sent

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to the following corporations: General Motors Corp., General Electric Corp., Ford Motor Co., Borg-Warner Corp., Brunswick Corp. and the Southern-Pacific Railroad. His work integrating Strategic Planning, Market Research and Econometrics has become a Harvard Business School Case Study. He has also written business plans and helped raise financing for several high-tech start-ups. At the time of his expression of interest in the plants, he was on the Corporate Staff of Owens-Corning. Owens-Corning dismissed him for communicating with the Trustee.

[4]The latter two plants had been closed by Owens-Corning following the reduction in competition. Hence, their purchase was more difficult to finance.

to the court of Judge Sam Bell in Akron.

Judge Bell ruled that the request for an extension was valid. The decision, however, did not explicitly state that it was for all four plants. Owens-Corning claimed it must therefore be for only two and promised to challenge any Purchase Agreement written for four. During the extension, the Trustee opted to complete negotiations both ways (two plant and four plant) with U.S. Roofing.

When Judge Walinski returned to the bench, Owens-Corning challenged the legality of the Purchase Agreement and the number of plants it covered. The F.T.C. indicated it would not argue the two-plant/four-plant issue with Owens-Corning. It also would not argue the merits of the Purchase Agreement because the time was clearly not ripe for Judge Walinski's review according to the sequence of events established in the second consent decree.

U.S. Roofing entered the first of its two motions to intervene at this time. It was for the limited purpose of arguing the two-plant/four-plant issue, which was being conceded by the F.T.C. Judge Walinski accepted U.S. Roofing as Intervenor in the case.

The district judge ruled in favor of Owens-Corning on the two-plant/four-plant issue but agreed with the F.T.C. that the time was not ripe to judge the merits of the purchase agreement.

The F.T.C. proceeded to review the U.S. Roofing bid. During the public comment period, Owens-Corning entered testimony through "expert witnesses" to the effect that U.S. Roofing did not possess the capacity and intent to operate the plants that were required by the Final Judgement. U.S. Roofing demonstrated to the satisfaction of the

F.T.C., however, that these charges were false and that much of the data upon which they were based was deliberately and clearly erroneous.

The F.T.C. approved the U.S. Roofing bid.

Owens-Corning challenged the approval, invoking its privilege to a "de novo" review.[5]

At this time, U.S. Roofing entered its second application for Intervenor status, this time without restriction or special purpose. Judge Walinski granted the second motion for Intervenor status.

The primary purpose of the second Intervention was to secure appeal rights.

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[5] Owens-Corning complained bitterly at this hearing that the price settled on between the Trustee and U.S. Roofing was too low. Again, price provides an illuminating key. It is a clear quantitative measure of the perceived investment risk that was created by Owens-Corning's attempted interference with Trust from the sidelines. The second consent decree was explicit on the matter of price, however. It said that there would be no minimum (Appendix F at 15).

U.S. Roofing had a substantial investment of time and money to protect and feared a dual systemic failure which loomed ahead.

First, in his decision on the two-plant/four-plant issue, Judge Walinski had already clearly indicated a prejudice toward the defendant[6] (which had hired his nephew, Toledo attorney Richard S. Walinski, as local counsel in this case).

Second, the F.T.C. was publicly rethinking its role at the time and had assumed a less aggressive posture in anti-trust litigation than it had when U.S. Roofing had first become involved.

As feared, the judge, in his Opinion and

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[6] "Although the Court finds merit in many of the arguments raised by OCF with regard to deficiencies in U.S. Roofing's commitment and financial backing, these issues are not yet ripe ... The arguments made by OCF should be made first to the Commission, and then, if the Commission approves the transaction, to this Court..." (Appendix D at 6,7)

Order dated February 2, 1987 (Appendix B), reversed the findings of both his trustee and the F.T.C. on every major point. He ruled that U.S. Roofing a) did not have the financial capacity b) did not have the marketing capacity and c) did not have the intent to operate the plants. The Judge also ruled that the Purchase Agreement lacked mutuality because it contained contingencies and therefore was illusory. Finally. the judge castigated his trustee for making allowances in the purchase agreement that would allow the purchaser to operate the plants.[7]

As also feared, the F.T.C. did not appeal

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[7] Owens-Corning had drawn the property lines between the asphalt refineries, which they would keep, and the shingle plants in such a way as to make them inoperable. Major assets such as air pollution equipment, asphalt storage tanks etc. were on the refinery side of the lines.

the Order.

U.S. Roofing, as Intervenor (now without limitation or special purpose), sought justice through an appeal to the Ninth Circuit Court, asking for the examination of Judge Walinski's findings of fact and the Judge's interpretation of the principal of Mutuality.

Owens-Corning filed a motion to have the case dismissed for lack of jurisdiction. The Circuit Court did not rule immediately on this motion. Briefs were submitted on the substance of the appeal itself.

Supporting U.S. Roofing's appeal, the F.T.C. entered a statement expressing its belief "that the district court's decision was erroneous and U.S.R. should have been approved as the purchaser of the assets." (Appendix B at 3.)

On August 4, 1988, the Sixth Circuit Court ruled in favor of Owens-Corning's preliminary

motion stating that U.S. Roofing, as Intervenor, could not appeal. The Circuit Court then recommended this jurisdictional decision for publication (referencing Rule 24, Appendix A at 1)

U.S. Roofing, wishing to be heard, has petitioned for writ of certiorari to the appellate court.

REASONS FOR GRANTING THE WRIT

I. THE ORDER OF THE COURT OF APPEALS DISENFRANCHISES AN ENTIRE CLASS OF LITIGANT: THE INTERVENOR.

Working together in a contract or against each other in a lawsuit, the exertions of two parties may cause damage to others. The Law serves Society well when it recognizes this.

Regarding lawsuits, three rules have arisen from this recognition: Rule 19 (compulsory joinder), Rule 23 (class actions) and Rule 24, which allows Intervention.

Though the history of Intervention dates back to Roman Law, its inclusion in Anglo-American legal procedure is relatively recent. Cautiously, the rights of the Intervenor have been expanded. In particular, when Rule 24 superceded Equity Rule 37, the Intervenor

became recognized as a mature class of litigant, equal to the Plaintiff and Defendant as a party, freed from the principle of Subordination which had made its concerns "secondary to the main proceeding."

Now, in the Appeals Court, in a decision recommended for full text publication, a precedent has been tendered which seeks much more than a mere return to the era of the Subordinated Intervenor. The Circuit Court stated that the Intervenor, U.S. Roofing, "had no independent rights." (emphasis added, Appendix A at 10.) The ruling goes further to state that the Intervenor could "at best tag along to coattails" of the Plaintiff in an appeal.

And further, the ruling states that the Intervenor was " ... neither a party to the Final Judgement, nor to any consent agreement or order." (Appendix A at 11, this despite the

fact that Judge Walinski's Opinion & Order was delivered well after he granted full Intervention)

What therefore is an Intervenor if it has no rights and is not a party to the case it joins?

Having thus stripped the Intervenor, the ruling proceeds to quote the Supreme Court in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975), "... a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it." (emphasis added here)

Many more similar cases follow that repeatedly illustrate that a non-party has no rights in anti-trust cases because it is not empowered to enter.

This case is clearly different. U.S. Roofing did not enter with a private suit complaining about Owens-Corning's anti-

competitive behavior. The F.T.C. properly invoked anti-trust law when Owens-Corning bought its roofing competitor; and it properly invoked the power of the federal courts when Owens-Corning deliberately broke its divestiture promise to the Government.

Furthermore, Judge Walinski properly allowed U.S. Roofing to join the case in recognition of the extent of its contractual detriment.[8] Denying the Intervention would have violated

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[8] U.S. Roofing was no random litigant attempting to abuse Rule 24. Through proceedings overseen by the district court, this Intervenor had been solicited and culled by a court-appointed Trustee, and induced to spend a great deal of time and money visiting the plants, preparing the business plan required by the Final Judgment, securing appraisals, arranging financing and later satisfying the F.T.C. that it had both the capacity and intent to restore the competition that was lost when the defendant had purchased its competitor. In granting the first intervention Judge Walinski stated. "... U.S. Roofing has an interest in the property which is the subject of this action and ... the FTC does not adequately represent U.S. Roofing's interest..." (Appendix D at 9.)

the intent of Rule 24 and denied the purchaser, a party to a contract, an avenue to injunctive relief.

Clearly, the mechanism of entitled Intervention is the ideal manner of bringing an approved purchaser into a court-managed divestiture; the identity of the purchaser is necessarily unknown at the outset of the case.

In refusing to hear U.S. Roofing's appeal, the Circuit Court neither a) attempted to remove the title Intervenor from this Petitioner nor b) indicated that the Petitioner had failed to satisfy the established requirements appeal rights (see Diamond v. Williams, 106 S.Ct. 1697 (1986)).

Instead, the conclusion was drawn that, as the Intervenor had not been a party in the beginning of the lawsuit, it could never be a party at all. Whereas all Intervenors join suits after they are filed, this Appeals Court

decision must, therefore, be considered a reversal of the basic entitlement granted to qualified Intervenors in recent times.

Is this in the best interest justice? The petitioner prays that the Supreme Court will view that it is not.

II. A VALUABLE MECHANISM FOR RESOLVING SITUATIONS OF NON-COMPLIANCE WITH CONSENT ORDERS HAS BEEN INJURED BY AN UNREPENTANT DEFENDANT AND THE MISINTERPRETATION OF INTERVENOR STATUS.

The de novo review contemplated by the Final Judgement sits at the core of an ideal framework for expeditiously resolving cases of non-compliance with administrative consent decrees. These can be messy situations characterized by onerous litigation.

The mechanism illustrated in the Final Judgment can function nicely. In fact, a nearly identical case was neatly resolved with Jim Walter Corp. during the same time period

as the Owens-Corning case. Again, there were four asphalt roofing plants involved - on the east coast this time. A Trustee was brought in to handle the divestiture. Everything went extremely smoothly.

This approach, when it works, takes a considerable burden off the court. The agency seeking redress hammers out an agreement with the plaintiff and hands it to a district judge for signature. Resolution is overseen by a professional trustee whose fee is paid by the defendant. No further litigation need be necessary.

Only if something clearly goes wrong should the de novo provision be invoked. If it is, both the Government and the Defendant know that they will, or should, stand as equals before the district court.

In the Owens-Corning case, however, the disruptive actions of an unrepentant defendant

- attempting to complete its avoidance of anti-trust law - have nearly destroyed this mechanism. After failing to stop the Trustee or the F.T.C. with its legal thrashing, the defendant invoked the de novo review.

The local judge in Toledo then ruled with the defendant. Our rules of procedure recognize that judges can fail. That is a primary reason why there are courts of appeal.

But the F.T.C. walked away, its judgment insulted and its charter frustrated. The extent of the damage to this valuable mechanism can be seen clearly between the lines of a statement filed by the F.T.C. with the Appeals Court after the Intervenor chose to go on alone. The brief stated that the Commission's opinion was that the district court's decision had been erroneous. It also seems to indicate, however, that its reason for not appealing the ruling was its intention

to retreat from the mechanism of trusts with court oversight to the litigious fortifications of the Administrative Procedures Act (Appendix B at 2,3.).

Did the district court fall down when it was performing its de novo review? The Intervenor and the Plaintiff have both said so in writing. The Supreme Court is not, however, being asked to decide this issue. It rightfully belongs in circuit court.

Should the Court choose to hear this Petitioner and eventually resolve to reinforce the rights of Intervenors, however, it will have the opportunity to contribute to the rehabilitation of a mechanism that can save the judicial system considerable expense and effort in cases of non-performance in consent judgments.

That added strength will not arise from reaffirming the Intervenor's right to

injunctive relief. The greater good will come from a clear indication of support for the procedure by the Supreme Court. This kind of lure that could bring the F.T.C. back out onto the field of compromise.

III. THE PRELIMINARY INJUNCTION IS AN UNSANCTIONED DEPARTURE IN CONFLICT WITH DECISIONS OF THE SUPREME COURT.

Regarding the principal of subordination, Miller and Wright says:

> It was never very clear what this limitation meant. When it was given application the results often were undesirable. Thus the limit was quite deliberately omitted from Rule 24. Though a few cases seem to have read the former requirement back into the rule, the better view is that it is gone forever. (Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d Sec. 1920.)

Regarding the appeal rights of intervenors, Miller and Wright says forthrightly:

> One who has been allowed to intervene in an action may appeal from subsequent orders in the action. (Ibid. Sec. 1923 citing: Fishgold v. Sullivan Drydock & Repair Corp., 1946, 66 S.Ct. 1105; SEC v. U.S. Realty & Improvement Co., 1940, 60 S.Ct. 1044; Cerro Metal Prods. v. Marshall, C.A.3d, 1980, 620 F.2d 964,969; In the Matter of First Colonial Corp. of America, C.A.5th, 1977, 544 F.2d 1291, cert denied 97 S.Ct. 1696; Klein v. Nu-Way Shoe Co.,C.C.A.2d, 1943, 136 F.2d 986.)

Let stand, the Sixth Circuit's decision essentially voids Rule 24.

CONCLUSION

For the above reasons, the petitioner, U.S.Roofing Corporation, respectfully requests that the Court issue the writ of certiorari and reverse the decision of the Sixth Circuit Court.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 87-3334

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff,

U.S. ROOFING CORPORATION,
Intervenor-Appellant,

v.

OWENS-CORNING FIBERGLAS CORP.,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed August 4, 1988

Before: LIVELY, MERRITT, and BOGGS, Circuit Judges.

BOGGS, Circuit Judge. This case presents intriguing questions concerning federal court jurisdiction. Intervenor-appellant U.S. Roofing Corporation (USR) appeals the district court decision reversing the Federal Trade Commission's (FTC) finding of fact that USR was qualified to purchase certain roofing divisions of defendant-appellee Owens-Corning Fiberglas Corporation (Owens-Corning). The Federal Trade Commission elected not to appeal the district court decision to this court. We dismiss USR's appeal for lack of appellate jurisdiction.

I

Owens-Corning, a major manufacturer of roofing products, negotiated a settlement to a proposed FTC challenge in 1980 of its acquisition of the Lloyd Fry Roofing Company (Fry), one of the nation's largest privately owned roofing manufacturers. In April 1977, Owens-Corning acquired four plants from Fry. They were located at Compton, California; Portland, Oregon; San Leandro, California; and Woods Cross, Utah. In settlement of that proposed challenge, Owens-Corning and the FTC agreed on certain criteria for an "eligible purchaser" of these plants in a consent order (first consent order). On April 8, 1981, that order was entered by the FTC as a final order. After two years of attempting to sell the plants, Owens-Corning moved to reopen the consent order on the ground that significant changes had occurred in the roofing industry. In 1984 the FTC denied the request.

Thereafter, FTC brought an action for civil penalties against Owens-Corning in district court pursuant to 15 U.S.C. § 45(1).[1] Negotiation between the FTC staff and Owens-Corning resulted in a second consent order. The FTC then filed both a Complaint and this second consent order in the district court. The second consent order became the court's Final Judgment pursuant to 15 U.S.C. § 45(1).

In that order, Owens-Corning and the FTC agreed that the district court would appoint an independent trustee, nomi-

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[1] 15 U.S.C. § 45(1) states that "[a]ny person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. . . . In such actions, the United States district courts are empowered to grant mandatory injunctions and *such other and further equitable relief* as they deem appropriate in the enforcement of such final orders of the Commission." (emphasis supplied)

nated by the FTC and approved by Owens-Corning, who would have nine months to find a "qualified purchaser" or "qualified acquirer." The FTC would initially determine whether a proposed acquirer met the qualifying criteria in the final judgment,[2] but that determination would be subject to a *de novo* factual review in the district court.[3] Upon the failure of the Trustee to find a "qualified purchaser" within the nine month period, the divestiture obligation of Owens-Corning would terminate.

Unable to find a qualified purchaser within the nine month period, the Trustee sought an extension of thirty days, the maximum permitted by the Final Judgment, to try to sell the Compton and Portland plants. The court granted the extension on June 14, 1985.

On June 28 the Trustee entered into a purchase agreement with USR for the sale of all four plants at a price of $1,200,000. The Trustee failed to consult Owens-Corning in making the deal with USR. Owens-Corning argued that this price represented a mere 22% of the plants' appraised real [illegible] value of approximately $5.5 million. The purchase agreement limited, in apparent recognition that the Trustee had not requested an extension for the San Leandro and Woods Cross plants, that if USR were not permitted to purchase those plants, USR could purchase the remaining two plants for $800,000.

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[2]A proposed acquirer was to be approved:

> only if divestiture to the proposed acquirer [would] further the remedial purposes of the Federal Trade Commission's proposed Order in Docket No. C-3061 . . . and the proposed acquirer [had] the capacity and intent to operate the plants to be acquired as a facility or facilities for the manufacture of asphalt roofing products.

[3]Pursuant to the Final Judgment, the factual record upon which the district court's decision was based was compiled before the FTC.

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Owens-Corning filed a motion in district court challenging the validity of the "purchase agreement" on several grounds. Owens-Corning argued that the purchase agreement lacked mutuality; that the Trustee acted beyond his authority by agreeing to unauthorized conditions; and that the granting of an extension was an abuse of discretion. In response to this motion, the FTC requested the right to review these issues first, which the district court granted.

Owens-Corning also sought a declaration that, under the Final Judgment, its divestiture obligations respecting the San Leandro and Woods Cross plants had expired when the Trustee failed to request an extension of time to sell these two plants. The FTC did not oppose this portion of the motion. USR filed a motion to intervene as of right under Fed. R. Civ. P. 24(a)(2) for the limited purpose of presenting its position on whether the extension of time applied to only two or four of the plants. The district court granted USR's motion for intervention, but ruled that Owens-Corning no longer was obligated to divest the San Leandro and Woods Cross plants. No stay of this order was sought.

At the hearing before the FTC, Owens-Corning submitted affidavits from several experts, demonstrating USR's inability to satisfy the criteria of a proposed acquirer in the Final Judgment. After a four month investigation, the FTC sent the Trustee a letter stating that, by a 2-1 vote,[4] the FTC would, under certain conditions, approve USR as a purchaser of the Compton and Portland plants. For example, the two-member majority conditioned its approval of the purchase agreement on USR's offering Owens-Corning a "buy-back" agreement, precluding USR or its shareholders from profiting from a quick liquidation of the plants.

Dissatisfied with the FTC's findings that USR possessed the financial capacity and intent to operate the plants as roof-

[4]The Commission had only three commissioners at the time.

ing corporations, Owens-Corning sought the *de novo* review provided in the court's Final Judgment. USR again moved to intervene, this time for permissive intervention as to all issues under Fed. R. Civ. P. 24(b)(2). The district court granted USR's motion for permissive intervention.

On February 3, 1987, interpreting and applying the terms of its own Final Judgment, the court in its *de novo* review reversed the FTC's factual findings, and held that USR did not meet the criteria set forth in the Final Judgment. Specifically, the court found that USR lacked the capacity to operate the plants as manufacturing facilities of asphalt roofing products; that the proposed divestiture would not further the remedial purposes of the FTC's second consent order; that USR lacked the requisite intent to operate the plants as manufacturing asphalt roofing products; and that the contract between the Trustee and USR was illusory and lacked mutuality, thus exceeding the Trustee's authority.

On April 6, 1987, only USR filed a notice of appeal from the district court's judgment. On May 7, 1987, in light of the FTC's decision not to appeal, Owens-Corning filed in this court a Motion to Dismiss Appeal for Lack of Jurisdiction.

This case presents two major issues:

(1) in the context of an agreement to settle an action to enforce an FTC consent decree in district court pursuant to 15 U.S.C. § 45(1), which agreement becomes the Final Judgment of the district court, may the district court, in enforcing the terms of that Final Judgment, conduct a *de novo* review of FTC factfinding?

(2) assuming the district court could exercise such *de novo* review, does USR, as an intervenor under Fed. R. Civ. P. 24(b)(2) in 15 U.S.C. § 45(1) litigation, have any independent right to appeal the district court's factual determinations to this court, where the FTC has elected not to appeal from those determinations?

II

The FTC and Owens-Corning, as parties to the district court's Final Judgment, agreed and stipulated to the procedure for determining whether a proposed acquirer met standards relating to financial capacity and intent to operate the plants as asphalt roofing facilities. The language of the stipulated Final Judgment clearly states that the district court, upon Owens-Corning's petition, is to undertake an "independent *de novo*[5] determination" as to whether USR met the agreed on criteria in the final judgment. FTC's staff attorney stated, in the hearing before the district court, that "[t]his is a *de novo* review, and by that is meant that the Court is not bound by the Commission's findings of fact . . . ."

USR argues, on the other hand, that despite the language providing for district court *de novo* review, the district court was nevertheless required to accord substantial deference to the FTC findings on the financial capacity and intent of USR. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 726 (1948). *Firestone Tire & Rubber Company v. Federal Trade Commission*, 481 F.2d 246, 248-49 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1974).

While we are mindful of previous rulings that federal courts generally do not have the discretion to set aside FTC findings of fact unless they are clearly erroneous, those rulings arose in direct challenges to agency action. The instant case involves enforcement of a stipulated final judgment entered by a district court pursuant to its enforcement authority under the Federal Trade Commission Act, 15 U.S.C. § 45(1). The Supreme Court has indicated that "there may be inde-

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[5]Generally speaking, judicial review of agency determination is limited to examination of the agency record. *De novo* review, however, permits the reviewing court not only to examine the record, but to make its own findings of fact, unconstrained by prior agency factual determinations.

pendent judicial fact-finding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Citizens to Preserve Overton Park, Inc. v Volpe*, 401 U.S. 402, 415 (1971).[6] The Court has also stated that " . . . *de novo* review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The implementing regulations for 15 U.S.C. § 45 indicate that "a proposal to settle a matter in adjudication by consent agreement shall be submitted by way of a motion to *withdraw* the matter from adjudication for the purpose of considering the proposed consent agreement." 16 C.F.R. § 3.25 (emphasis supplied). Moreover, in another section of the FTC Act, which deals with civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices, the Congress expressly provided that the terms of a cease and desist order may indicate that the Commission's findings respecting material facts shall not be conclusive. 15 U.S.C. § 57b (c)(1).

Contrary to USR's characterizations, the instant case is an action initiated in the district court by the FTC, seeking relief from the district court, and requiring the district court to resolve factual questions in the context of a stipulated final judgment entered by it. In the circumstances of this civil penalty remedy hearing pursuant to 15 U.S.C. § 45(1), the FTC assumed the position of any other litigant, entitled to be heard, but not deferred to. The final determination as to an appropriate settlement of a civil penalty action pursuant to § 45(1) is, in our view, within the power of the court. Agree-

[6]16 C.F.R. § 3.25 (e) provides that if a matter is withdrawn from adjudication before an Administrative Law Judge because the parties have been able to arrive at a consent agreement, "the Commission will treat the matter as being in a nonadjudicative status with respect to those respondents signing the proposed consent agreement."

ment between the parties in settling this § 45(1) action, rather than an enabling federal statute or provision of the Administrative Procedure Act, gave the FTC the initial factfinding function for assessing whether a proposed purchaser met the criteria in the Final Judgment.

Moreover, neither the language nor the legislative history of the Federal Trade Commission Act indicates that Congress necessarily intended to diminish the factfinding power of the district court in enforcing final judgments under § 45(1). Indeed, while § 45(1) is silent regarding the factfinding power of a district court, it indicates the breadth of the authority given by Congress to the district courts in enforcing FTC orders. It states that "the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of ... final orders of the Commission." 15 U.S.C. § 45(1). We therefore hold that a district court's *de novo* factual review is permissible for the purpose of enforcing, pursuant to 15 U.S.C. § 45(1), its final judgment based on a consent order to which the FTC itself is a party, and where the FTC has agreed to be bound by such *de novo* review.

III

In its motion to intervene as of right under Fed. R. Civ. P. 24(a)(2),[7] USR argued that it had an interest in purchasing the plants, and that neither the Trustee nor the FTC would adequately represent the argument that it should be allowed to purchase all four plants. The district court granted USR's

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[7]Fed. R. Civ. P. 24(a)(2) provides that "[u]pon timely application anyone shall be permitted to intervene in an action ... when the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

motion to intervene as of right. USR argues that at that point it formally became a party to this action, and has been ever since. USR, in our view, mischaracterizes the nature and extent of its participation in this lawsuit.

The scope of this intervention as of right was clearly circumscribed by the district court to the issue of whether the extension of time extended to all four plants, or only two of the four plants. The district court reasoned that the FTC did not adequately represent USR in this respect since it had agreed not to oppose Owens-Corning's motion to declare that the June 14, 1985 extension applied to only the Compton and Portland plants. By granting USR's limited motion for intervention as of right, the district court did not indicate that USR had an interest in the property independent of the terms of the Final Judgment to which only Owens-Corning and the FTC were parties, or any right of appeal beyond the extension issue.

After consideration of the parties' arguments, the district court ruled that USR would have an opportunity to purchase only two of the four plants. Subsequently, it directed Owens-Corning and the FTC to present their positions before the Commission as provided in the consent order, and permitted USR to present its position as well. After the parties presented their evidence and arguments, the Commission determined that USR possessed the financial capacity and intent to operate the plants as roofing corporations under the criteria in the consent order, and thus could purchase the plants. Pursuant to the Final Judgment, Owens-Corning sought a *de novo* review of the FTC determination that USR met the criteria in the Final Judgment. Both Owens-Corning and the FTC filed briefs in the district court.

As stated above, USR then filed a second motion for intervention in the district court, this time for permissive intervention under Fed. R. Civ. P. 24(b)(2).[8] USR, in its motion

[8]Fed. R. Civ. P. 24(b) provides that "[u]pon timely application anyone may be permitted to intervene in an action . . . when an applicant's

opposing the dismissal of its appeal to this court, argued that "it was unsure it needed additional permission to intervene since its earlier Motion had been granted . . . ." Owens-Corning virtually ignored USR at this stage in the litigation, failing to serve any petitions, motions or briefs on USR. The district court granted USR's motion for permissive intervention.

The fact that a second motion for intervention was filed and granted suggests to us that USR had not become a formal party for all purposes of this litigation merely because it had earlier intervened on a limited issue. While USR argues that its "rights flow not from the Consent Judgment, but from the purchase agreement it entered into with Trustee Louis Klein," we fundamentally disagree. The validity of the purchase agreement in the context of this civil penalties action under § 45(1) depended on whether USR met the criteria set forth in the Final Judgment. The initial factual determination by the FTC was, in the instant case, only an extension of the district court's power to enforce FTC consent orders or decrees under § 45(1). In this context, enforcing the terms of a final judgment was a matter in which a private individual such as USR had no independent rights. We express no view as to whether USR could have brought a private contract or tort action, or any other action, against the Trustee individually.

USR argues that it sought to intervene "for the purpose of ensuring and defending its right to purchase the plants, pursuant to USR's agreement with the Trustee." However, USR misses the point—its right to purchase the plants depended on the logically prior determination of whether it

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claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

met the criteria negotiated and hammered out in the second consent order between Owens-Corning and FTC. Owens-Corning's obligation to divest those plants thus depended on the application and interpretation of the "qualified purchaser" criteria in the court's Final Judgment.

When the FTC failed to appeal the district court's reversal of its findings of fact on USR's financial capacity and intent to operate the plants as roofing facilities, that was the end of the matter. Even if the FTC elected to appeal those findings to this court, USR could only have tagged along on the coattails of the FTC. By electing not to appeal, the FTC has accepted the district court's decision as the final resolution of the matter in enforcement of the FTC order and the FTC complaint for civil penalty. We also note that the Trustee has elected not to appeal to this court, and thus failed to maintain whatever right he might have had to enforce the proposed "purchase agreement" by appealing the district court's dismissal of the case.

USR seeks to assume the FTC's role, and compel Owens-Corning's divestiture of certain roofing plants for its own private gain. USR, however, was neither a party to the Final Judgment, nor to any consent agreement or order.

In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975), the Supreme Court stated that "a well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it." (citations omitted) *See also Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 20 (9th Cir. 1971)("[o]nly the Government can seek enforcement of its consent decrees."); *United States v. American Society of Composers, Authors and Publishers*, 341 F.2d 1003, 1008 (2d Cir.), *cert. denied*, 382 U.S. 877 (1965)("the government is the sole proper party to seek enforcement of government antitrust decrees.")

Moreover, USR may not, as a private party, invoke the jurisdiction of the federal courts to enforce the Federal Trade Commission Act. Congress has clearly limited the invocation of jurisdiction under the FTC Act to the Commission itself. *Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974)("[T]he Federal Trade Commission Act may be enforced only by the Federal Trade Commission. Nowhere does the Act bestow upon either competitors or consumers standing to enforce its provisions." (citations omitted)) *See also Driesbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981); *Fulton v. Hecht*, 580 F.2d 1243, 1248 n.2 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

In attempting to appeal the district court's reversal of the FTC factual findings, USR in essence seeks to enforce a private divestiture remedy. USR basically seeks to compel Owens-Corning to divest certain plants it purchased from Fry. We have held that Section 16 of the Clayton Act, 15 U.S.C. § 26, "does not create a private divestiture remedy." *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1060 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

Since Owens-Corning has not challenged USR's right to intervene in this lawsuit, USR argues, Owens-Corning ought to be foreclosed from raising the jurisdictional issue of USR's right to appeal. On the contrary, jurisdictional questions may be raised for the first time on appeal, and a court may *sua sponte* raise jurisdictional issues. The question of whether there exists a justiciable controversy in the sense of appealability to this court is an essential jurisdictional issue. Moreover, the jurisdictional question here concerns the right to appeal to this court, which was not before the district court.

In *Golden v. National Finance Adjusters*, 555 F.Supp. 42 (E.D. Mich. 1982) the court dismissed a private plaintiff's attempt to enforce a government antitrust decree against the defendant on the basis that the suit lacked a justiciable controversy. The district court stated that

> [u]nder the circumstances of the facts alleged, there is no substantial controversy touching the legal relations of parties having adverse legal interests. Since plaintiffs cannot enforce the consent decree against the defendant, plaintiffs do not have any legal rights under the consent decree which are adverse to the defendant's rights under it. The issue of what the consent decree means presents a purely abstract question in the absence of any right of plaintiffs to enforce the consent decree. Plaintiffs have failed to show how an interpretation of a consent decree between the government and defendant, which plaintiffs cannot enforce against defendant, presents a justiciable controversy to this Court."

555 F.Supp. at 46-47.

We therefore hold that this court lacks jurisdiction to hear USR's arguments, and accordingly dismiss USR's appeal for lack of jurisdiction.

APPENDIX B

No. 87-3334

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff,

U.S. ROOFING CORPORATION,
Intervenor - Appellant,

v.

OWENS-CORNING FIBERGLAS CORPORATION
Defendant-Appellee.

STATEMENT OF FEDERAL TRADE COMMISSION

The Federal Trade Commission ("Commission") submits this statement to clarify its position in this appeal, which arises from the district court's decision to disapprove U.S. Roofing Corporation ("U.S.R.") as purchaser of assets that defendant Owens-Corning

APPENDIX B

Fiberglas corporation ("OCF") was ordered to divest by the Commission's order in Docket No. C-3061, 97 F.T.C. 249 (1981) and by the final judgment entered by the district court on July 30, 1984 ("Final Judgment"). U.S.R. is qualified under the Final Judgment and should have been approved as purchaser of the assets. The district court's decision, however, was based on its independent, de novo evaluation of U.S.R.'s eligibility to acquire the assets. Such an evaluation is peculiar to the circumstances of this case, and differs markedly form the review of decisions of the Commission provided by the Administrative Procedure Act, 5 U.S.C. Sec. 706, which usually would obtain in a case such as this. Given

the limited scope of review of the district court's factual determinations, the Commission determined not to appeal.

The Commission, however, continues to believe that the district court's decision was erroneous and that U.S.R. should have been approved as the purchaser of the assets. Nevertheless, the arguments advanced by U.S.R. in support of its position are not necessarily those of the Commission. Rather, the Commission's views are stated in its November 1, 1985 decision regarding U.S.R.'s purchase of the divestiture assets and are explained in

APPENDIX B

its briefs below.[1]

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[1] Indeed, certain statements made by U.S.R. are directly contrary to the Commission's views. For example, U.S.R.'s brief implies that under what it terms the "earlier FTC order" OCF was entitled to some minimum price for the divestiture assets. Brief at 15. That is incorrect. The Commission has steadfastly maintained that divestiture provisions such as that contained in the original order do not entitle a respondent to a minimum price for the divestiture assets and court have uniformly upheld that view. E.g., United States v. Louisiana Pacific Corp., 554 F. Supp. 504, 508, 510 (D. Or. 1982), rev'd on other grounds, 754 F.2d 1445 (9th Cir. 1985); United States v. Papercraft Corp., 393 F.Supp. 408, 412 (W.D. Pa. 1975), rev'd on other grounds, 540 F.2d 131 (3d Cir. 1976). The order providing for appointment of a trustee in this matter simply made more explicit the unconditional nature of this aspect of OCF's divestiture obligation.

APPENDIX B

Dated: February 25, 1988

Respectfully submitted,

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[No. C 84-7635]

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

OWENS-CORNING FIBERGLAS CORP.,
Defendant.

WALINSKI, J.

This matter is before the Court on Owens-Corning Fiberglas Corporation's ("OCF") petition for de novo review of the Federal Trade Commission's ("FTC") decision to approve the proposed divestiture of certain OCF manufacturing facilities. Also before the Court is FTC's opposition and OCF's reply thereto. Additionally, OCF has moved

to supplement the record and FTC has filed opposition to this motion.

Pursuant to the terms of a Final Judgment executed on July 30, 1984, the Court appointed a Trustee to sell OCF's asphalt roofing plants at Compton, California; Portland, Oregon; San Leandro, California; and Wood Cross, Utah. Louis Klein, Jr. was appointed as Trustee on August 29, 1984. According to the Final Judgment, the Trustee had nine months, commencing from the day following his appointment, to find a prospective acquirer of the plants. The Final Judgment empowered the Court to extend this time for a period of thirty days upon representation by the Trustee that negotiations were ongoing and likely to lead to the execution of a purchase agreement.

APPENDIX C

The Trustee solicited offers from approximately fifty companies. Only six companies expressed serious interest in purchasing one or more of the plants. Just prior to the expiration of the Trustee's term, Zander & Co. and U.S. Roofing Corporation ("USR") submitted written offers for the two plants at Compton and Portland. Zander offered alternative bids of $500,000 cash or $1.5 million to be paid over ten years. Zander later withdrew its offer. George Brown, on behalf of USR, offered a cash price of $800,000, subject to certain deductions. On May 30, 1985, the Trustee moved the Court for a thirty day extension of the Trust, claiming that there were ongoing negotiations with Brown likely to lead to the execution of a purchase agreement.

APPENDIX C

Before the Court on his motion for extension, the Trustee stated that Brown had just obtained a financial partner, Allen Portney, and a loan commitment from Barclays American Business Credit ("Barclays"). The Trustee further stated that he would not have asked for an extension had Brown not obtained financing. During negotiations, Brown replaced Portney with three individual investors (Thomas Corrigan, Ernest Fernandaz, and Rudy Mazza) Brown met these individuals through Barclays. According to Brown, Portney was removed because he was interested only in liquidating the plants. The three investors had never expressed a previous interest in the plants. Nor had they ever seen the plants. Further, these individuals had no apparent experience in

the roofing industry. Brown, Corrigan, Fernandez and Mazza subsequently formed USR. Brown is a minority shareholder and has assigned all his "right, title and interest" to his bid on the plants. Unaware of these events, the court granted an extension of time through June 29, 1985, in which the Trustee could negotiate a purchase agreement with USR.

On June 17, 1985, Barclays advised Brown the commitment letter it had sent him had become invalid on June 15. However, Barclays would grant a one week extension on the condition that Barclays receive the required $50,000 commitment fee by June 21. Barclays' commitment expired when the fee was not paid.

Brown, on behalf of USR, offered a price of $800,000. The price was subject to

certain deductions for the cost of relocating assets (approximately $600,000), certain of USR's legal costs and the Trustee's fee. On June 28, 1985, USR and the Trustee executed a purchase agreement for the plants.[1]

Pursuant to the terms of the Final Judgment, USR's proposal was placed on the public record. OCF objected to the proposed divestiture in comments filed on August 22, 1985. In October, 1985, OCF and USR presented their views to the Commission. On November 1, 1985, the FTC,

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[1] The agreement contained alternative provisions depending on the number of plants to be divested. On September 12, 1985, the Court ruled that OCF's obligation to divest the two nonoperating plants at San Leandro and Woods Cross had terminated.

by a two to one decision,[2] issued a three and one-half page opinion approving the divestiture.

DE NOVO REVIEW

Pursuant to the terms of the Final Judgment, the Court is to make an independent de novo determination. (Final Judgment VI.E). Thus,

> [a] proposed acquirer shall be approved by . . . this Court, only if divestiture to the proposed acquirer will further the remedial purposes . . . and the proposed acquirer has the capacity and intent to operate the plant or plants to be acquired as a facility or facilities for the manufacture of asphalt roofing products. In determining whether to

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[2] At the time the decision was issued, the commission was composed of only three members instead of the usual five.

> approve a proposed acquirer, the following factors, among other considerations that may be relevant to the acquirer capacity and intent, and to the furtherance of such remedial purposes, shall be taken into account:
>
> . . . .
>
> 2. the financial capability of the proposed acquirer to operate the acquired plant or plants to manufacture asphalt roofing products;
>
> 3. the technical and marketing capability of the proposed acquirer to operate the acquired plant or plants to manufacture and sell asphalt roofing products; and
>
> 4. the intent of the proposed acquirer to operate the acquired plant or plants to manufacture asphalt roofing products.

(Final Judgment VI.F).

I. DIVESTITURE OBLIGATIONS UNDER THE FINAL JUDGMENT HAVE TERMINATED

OCF continues to argue that its divestiture obligations under the Final Judgment have terminated. In its September

APPENDIX C

12, 1985 order this Court stated that OCF's arguments should be made first to the Commission, and then, if the Commission approved the transaction, this Court would consider OCF's arguments as part of its de novo review. Therefore, the Court now addresses this issue.

OCF argues the "agreement"submitted by the Trustee does not constitute a "purchase agreement" as required by the Final Judgment. The agreement, OCF states, would permit USR to withdraw from the transaction at its option.

Upon a review of the documents submitted by the Trustee and the record before it, the Court finds that said documents do not constitute a binding "purchase agreement" as required by the Final Judgment. Pursuant to the terms of the agreement USR

is permitted to withdraw form the transaction at its option. In pertinent part, the agreement states:

> 5. Termination. This Agreement may be terminated without liability to any party hereto (a) by Purchaser if there shall have occurred in Purchaser's reasonable judgment a material adverse change in the business associated with the Transferred Assets or the prospect with respect to such business or there shall have occurred a material adverse change in the circumstances of the Purchaser or (b) by Purchases if the Closing shall not have occurred prior to July 1, 1986.[3]

Thus, any "material adverse change" in either the asphalt shingle business or in USR's circumstances would be sufficient reason to terminate the agreements. USR's option to withdraw is further

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[3] Presumably, the July 1, 1986 closing date has been extended by the parties' actions in pursuing this matter.

highlighted because USR would be the entity to decide in its "reasonable judgment" that a material adverse change had occurred. (See also Preincorporation Agreement Para. 14; Letter to FTC from Corrigan, Fernandaz, and Mazza, attached to the "Business Plan", at 1). Thus, USR's performance is entirely within the sole discretion of its stockholders.[4] Each shareholder may for himself determine what constitutes "material adverse change"[5] in his

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[4] The termination clause contained in the purchase agreement and the conditions set forth in the other documents also serve to question USR's intent to operate the plant.

[5] The shareholders have provided examples of "material adverse change," however, they have not defined the terms. The FTC argues that the occurance of a "material adverse change" will be evaluated under a commercially reasonable standard. The Court is not persuaded. All that would be created by accepting the FTC's position is additional litigation. Hence, if in

particular circumstances, thereby cancelling all obligations under the purchase agreement.

In light of the option given USR, in several documents, to withdraw from the purchase process, the Court finds that the so-called purchase agreement is illusory and lacks mutuality. At most, the documents before the Court are the equivalent of a letter of intent.

Even assuming arguendo that the documents submitted by the Trustee were a purchase agreement, it is clear that the agreement would impose conditions on OCF that are not authorized by the Final Judgment. The Trustee has acted beyond his authority.

OCF's judgment a material adverse change had not occurred, it would have to resort to the courts for a determination on that issue.

APPENDIX C

Included in the assets the Trustee has agreed to convey are:

> 1.3 Underwriters Laboratories, Inc's (UL") files relating to each product produced at each of the Plants and other information or documentation relating thereto, except if the UL files are transferable to OCF's proposed Southgate, California facility, then such files may be retained by OCF.
>
> 1.4 A perpetual easement as required to permit full access to and usage and maintenance of a High Efficiency Air Filtration ("HEAF") unit being sold as part of the tangible personal property of the Compton, California Plant.

Pursuant to the Final Judgment, the Trustee was authorized to divest of "plants" as defined in the Final Order. (Final Judgment at II.C; VI.B). As set forth in the Final Order, plants does not include perpetual easements and rights of way to the purchaser on property adjacent to the

specified real estate. (See FTC Final Order, No. 3061, issued 3/30/81 at 3). Nor does the meaning of plants include proprietary information, technological know-how, goodwill, or rights, claims and causes of action in the name of OCF which are required to be transferred by the Bill of Sale.[6]

The Final Judgment provided the Trustee with authority to sell only the plants on an "as is, where is" basis. (IX.B). Clearly, the Trustee went beyond his authority in agreeing to a purchase

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[6] Among the other terms agreed upon by the Trustee without authority are: the transfer of a going concern, OCF is required to sell to USR steam necessary to commercially use the saturant or asphalt coating and for OCF to pay certain of USR's legal fees, title insurance and survey. (Purchase Agreement, Para. 2.; 3.2(a); 3.2(b); 3.2(d)).

agreement with all these other added requirements.

The Court disagrees with the FTC's argument that the terms the Trustee agreed to are commercially reasonable. Said terms would be commercially reasonable if the Trustee had been authorized to divest a going concern. However, in the case sub judice, the Trustee was authorized to sell only the plants as defined in the Final Order. The additional terms agreed to by the Trustee, in this Court's opinion, are not consistent with the requirements under the Final Order.

Finally, the Court is perplexed by the events which transpired during the extended period granted by this Court. The impression left on the Court at the hearing on the Trustee's motion for extension was

that negotiations were underway with the prospective buyers, Brown and Portney. It would appear that up until June 24, 1985, when Brown and Portney toured the Compton plant, Portney still was a prospective buyer. Only three days later, on June 27, 1985, however, the Trustee indicated that Portney no longer was an equity partner in Brown's venture. Brown's new equity partner was Thomas Corrigan. The next day, the Trustee executed a purchase agreement with USR. Corrigan, Ernest Fernandez, and Rudy Mazza were majority shareholders at the time of the execution of the purchase agreement; Brown was a minority shareholder. Clearly, negotiations as contemplated by the Court did not occur during the extension period. The majority shareholders entered the scene at the last

moment thus playing no part in the "ongoing negotiations." Therefore, the Court concludes that the negotiations entered into by the Trustee at the last moment, and which led to the execution of the purchase agreement were beyond the scope of the extension and the Trustee's authority.

II. THE MERITS OF USR'S PURCHASE AGREEMENT

Even assuming arguendo that the purchase agreement was within the Trustee's authority, the factors upon which the Court must evaluate the proposed acquirer, USR, lead the Court to conclude that divestiture would not further the remedial purposes of the FTC order. Nor does USR have the intent or capacity to operate the plants on a long-term basis for the manufacture of

asphalt roofing products.

A. Divestiture of the Plants to USR Would Not Satisfy the Remedial Goals of the Commission's Order

"A proposed acquirer shall be approved by . . . this Court, only if divestiture to the proposed acquirer will further the remedial purposes of the Federal Trade Commission's Complaint and Final Order . . ." (Final Judgment VI,F). Presumably, divestiture was ordered so as to increase competition in the Western asphalt roofing products market.

The FTC argues that divestiture to a viable new entrant restores competition in the industry. Further, the FTC states that "a new entrant may be more likely than an incumbent to compete aggressively because it has not fallen into preexisting patterns

and may need to experiment in order to establish its own market position. A new entrant can thus invigorate a market and provoke greater efficiency and responsiveness to customers on the part of all market participants." (FTC's Response to OCF's Petition at 13-14). The Court agrees. However, in the case sub judice the determinative issue is whether USR is a viable new entrant. For the reasons set forth below, the Court finds that USR is not a viable entrant into the Western asphalt roofing products market. Therefore, divestiture of the plants to USR would not satisfy the remedial goals of the FTC's order.

B. USR Does not Have the Intent to Operate the Plants on a Long-term Basis to Manufacture Asphalt Roofing Products

APPENDIX C

"A proposed acquirer shall be approved by . . . this Court, only if the proposed acquirer has the . . . intent to operate the plant or plants to be acquired as a facility or facilities for the manufacture of asphalt roofing products." (Final Judgment, at VI,F.). The Court has reviewed the record and finds that USR does not have the required intent to operate the plants to manufacture asphalt roofing products.

With reference to the documents executed by the shareholder (Preincorporation Agreement, Letter to FTC from Corrigan, Fernandez, and Mazza, and Purchase Agreement), the terms of said documents have insulated the shareholders from the risks associated with the business. As it presently exists, USR is a shell

corporation without any assets whatsoever. USR does not even have a loan commitment from Barclays. This commitment expired on June 21, 1985, when USR failed to pay the required $50,000 commitment fee. The FTC argues that USR's shareholders are prepared to make their assets available to USR. This, however, in reality is not a commitment at all. Pursuant to the conditions outlined in the documents executed by the shareholders, all and/or any of them may withdraw the use of their assets at any time. What USR does have is the opportunity to immediately realize a profit on facilities it is purchasing for $800,000, less certain expenses, but which have a conservative value of $3.5 million. There is nothing to prevent USR from immediately selling the plants for a

healthy profit. This factor was recognized by the Commissioners who conditioned approval "on USR making an offer that would effectively remove it, or its shareholders' opportunity to make a profit on any such liquidation." (FTC Op. at n.2). While it is true that USR has proposed making a "buy-back" wherein OCF would reacquire the plants in exchange for OCF's agreement to indemnify USR for any and all of its losses, this "buy-back" proposal does not remove the shareholders' opportunity to make a profit. Moreover, USR has yet to make the "buy-back" proposal.

The FTC argues that evidence of the requisite intent can be found in Brown's persistent attempts to acquire the plants. However, the Court notes that Brown is a minority shareholder. Therefore, if the

last minute entrants, the majority shareholders, decided to liquidate the plants it is unlikely Brown would be in a position to prevent liquidation.

In light of the record before it, the Court concludes that USR does not have the requisite intent to operate the plants.

C. U.S.R. Does not have the Capacity to Operate the Plants as Facilities to Manufacture Asphalt Roofing Products

> A Proposed acquirer shall be approved by . . . this Court, only if . . . the proposed acquirer has the capacity . . . to operate the plant or plants to be acquired as a facility or facilities for the manufacture of asphalt roofing products. In determining whether to approve a proposed acquirer, the following factors, . . . shall be taken into account:
>
> . . .
>
> 2. the financial capacity of the proposed acquirer . . . .
>
> 3. the technical and marketing capability of the proposed acquirer . . . .

(Final Judgment at VI.F). Moreover, if the

proposed acquirer is a new entrant into the production and sale of asphalt roofing products, the Court may take into account the prospective acquirer's ability to obtain future technical and marketing capabilities. Upon an exhaustive review of USR's business plan, the Court finds that the plan is not definitive, not well thought out, and contains little substance. A review of the business plan reveals it underestimates, or ignores, significant costs that would have to be incurred to meet sales. Further, the plan contains no description of sales and marketing organization or customer base. Nor does the plan outline any strategies as to how sales and profit plans would be accomplished. These factors are especially important in the case sub judice because

APPENDIX C

(1) USR is not purchasing a going concern and (2) the relatively stagnant market.

USR's business plan is based on sales of $29.3 million in its first year of operation. This projection is approximately thirteen percent (13%) of the total value of shingles and rolls sold in the entire Western market in 1984. Thus, placing USR as one of the two largest firms in the industry. USR's own projections indicate that to survive in the first year of operation it must have sales of $14.5 million or 6.5% of the market. With these high sales USR would surpass several established firms.

In its review of these sales projections, the Commission concluded that USR's figures were optimistic and that in any event it was not essential that USR meet those

projections to survive. The Court disagrees. USR's projections are totally unrealistic. USR has provided no explanation as to how these sales will be accomplished. Thus, the Court is unable to understand how this new entrant could immediately acquire such a large share of the Western market. Mere reverence to the Fry model is insufficient.

With reverence to USR's financial capacity, the Court notes that USR has no operating capital. Nor does it have a present loan commitment from Barclays or any other institution. While USR does have a commitment from its shareholders, this commitment, as previously discussed, is highly conditional. Moreover, even if USR were to obtain the required capital to begin operation, to stay in business USR

would need a collection rate that is approximately 37% faster than the 55-60 day industry average. Further, because of USR's underestimation of certain costs, including the cost of raw materials and its interest cost resulting from its highly leveraged position, it would be forced out of business within a short time.

In light of the foregoing discussion, the Court finds that OCF's divestiture obligations under the Final Judgment have terminated. Further, even assuming arguendo that said obligations still were effective, the Court finds that USR possesses neither the required intent nor the financial, technical or marketing capabilities to operate the plants, on a long-term basis, as facilities for the manufacture of asphalt roofing products.

APPENDIX C

Accordingly, it is

ORDERED that the judgment of the Federal Trade Commission is reversed.

fURTHER ORDERED that OCF's motion to supplement the record is denied as moot.

FURTHER ORDERED that this case is dismissed.

Nicholas J. Walinski
Senior U.S. District Judge

Toledo, Ohio
February 2, 1987

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FEDERAL TRADE COMMISSION,
Plaintiff,

-vs-

OWENS-CORNING FIBERGLAS CORP.
Defendant.

No. C 84-7635
MEMORANDUM and ORDER

WALINSKI, J.

This cause came to be heard on a motion made by defendant Owens-Corning Fiberglas ("OCF") for a declaration that the divestiture obligations imposed by the July 30, 1984 Consent Decree in this matter have now terminated. Also before the Court are oppositions to OCF's motion filed by plaintiff Federal Trade Commission ("FTC") and the Trustee, Louis Klein, Jr. In

addition, U.S. Roofing Corporation has filed a motion to intervene which has been opposed by OCF. An oral hearing on the motions was held August 6, 1985. These matters are now decisional.

The FTC filed its complaint in this action July 27, 1984, seeking relief under Sec. 5(1) of the Federal Trade Commission Act. On July 30, 1984, this Court entered a Consent Decree which provided for appointment of a Trustee to divest certain assets at four OCF asphalt shingle plants. The Consent Decree specifically defined the scope of the Trustee's authority and gave the Trustee nine months to find a purchaser. (Consent Decree, Para. VI). The nine month period could be extended by thirty days if the Trustee represented that "negotiations are ongoing and are likely to lead to the execution of a purchase

agreement." (Consent Decree VI(B)). Such an extension was sought by the Trustee and granted by the Court up to and including June 29, 1985.

On June 28, 1985, the Trustee signed an submitted a document labeled "Purchase Agreement" for all four plants with U.S. Roofing, Inc. OCF claims this purchase agreement is unacceptable and therefore moves the Court for a declaration that divestiture obligations under the Consent Decree have now terminated.

In its motion, OCF contends that the document submitted by the Trustee does not constitute a binding purchase agreement as required by the Consent Decree because it permits the purchaser to withdraw form the transaction at its option. Further, OCF claims that because the purchase agreement would impose conditions on OCF that are not

authorized by the Consent Decree, the Trustee acted beyond his authority and the divestiture obligation lapsed. The FTC, on the other hand, argues that the Trustee submitted an enforceable contract within the specified time thus satisfying the requirements of the Consent Decree and that the next step in the process is Commission review. The FTC contends that any alleged deficiencies in the purchase agreement should be the subject of review by the Commission first, and only after such review should the issues be before this Court. The threshold question then, is whether the document submitted by the Trustee constitutes a purchase agreement within the meaning of the language contained in the four corners of the Consent Decree. United States v. Armour & Co., 402 U.S. 673, 682 (1971).

APPENDIX D

The Consent Decree, unfortunately, provides the Court with little guidance. It simply gives the Trustee nine months to find a "prospective acquirer" and requires that an extension of time granted shall be limited to that period necessary to execute a "purchase agreement." (Consent Decree, VI(B)). The Consent Decree fails to define either "purchase agreement" or "prospective acquirer."

In contrast, the Consent Decree is quite specific in its provision for approval of any proposed acquirer. It not only describes the procedure (Commission review followed by de novo review by this Court) but also sets forth four factors to be considered in determining whether to approve a proposed acquirer. (Consent Decree, VI(D-F)). The factors which are to be considered by the Commission, as well as

by this Court upon de novo review, focus on whether the proposed acquirer will further the remedial purposes of the FTC and whether "the proposed acquirer has the intent and capacity to operate the plants." (Consent Decree, VI(F)).

It is upon this language that the Court bases its finding that the Trustee has met the minimum requirements of the Consent Decree in obtaining a prospective acquirer and submitting a purchase agreement. Although the Court finds merit in many of the arguments raised by OCF with regard to deficiencies in U.S. Roofing's commitment and financial backing, these issues are not yet ripe. The provision of the Consent Decree provide for a specific review process, starting at the Commission level, in which a determination is to be make as to whether "the proposed acquirer has the

intent and capacity to operate the plants." (Consent Decree, IV(F)). The arguments made by OCF should be made first to the Commission, and then, if the Commission approves the transaction, to this Court as part of the de novo review provided for in the Consent Decree. Accordingly, the Court denies the motion made by OCF for a declaration that divestiture obligations imposed by the July 30, 1984 Consent Decree have now terminated.

The second issue before the Court is whether the extension of time to find a prospective acquirer and to execute a purchase agreement which was granted to the Trustee in this matter applies to the divestiture of the four asphalt shingle plants owned by OCF, or to only two of those plants. U.S. Roofing has filed a motion to intervene for the limited purpose

of submitting to this Court argument and documentation in support of its contention that the extension applied to all four plants. Rule 24(a) Fed. R. Civ. P. provides that upon timely application, anyone shall be permitted to intervene in an action:

> (2) when the applicant claims an interest relating to the property of transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest unless the applicant's interest is adequately represented by existing parties.

"Certainly, if the intervenor has an interest in property which is the subject matter of the action and this interest would be adversely affected, he is within the rule." 3B Moore's Federal Practice Sec. 24-62. U.S. Roofing clearly has an interest in the plants which are the subject matter of this action and argues

that the extension applies to all four plants which it hopes to acquire, rather than only two of the plants. The FTC does not adequately represent U.S. Roofing in this matter since it has agreed not to oppose OCF's motion to declare that the June 14, 1985 extension applied to only the Compton and Portland plants. Thus, finding that U.S. Roofing has an interest in the property which is the subject of this action and that the FTC does not adequately represent U.S. Roofing's interest, the Court grants the motion to intervene in accordance with Rule 24(a) Fed R. Civ. P. However, having considered the arguments of U.S. Roofing in this matter, the Court finds the contentions without merit. The June 14, 1985 Order granting the Trustee the extension he requested does not specifically refer to the number of plants

to which the thirty day extension applies. U.S. Roofing claims that there is no evidence anywhere that the Honorable Sam H. Bell was "changing the prospective transaction from four to two plants." (June 14, 1984 Order at 4). This Court disagrees. At the June 13, 1984 hearing on the motion for extension, the Trustee described the ongoing negotiations that formed the basis of his motion:

> The [plant] visits took place March 13, and March 18 at the two Owens-Corning Fiberglas plants located in Compton, California and Portland Oregon. The other two plants which are the subject of the final judgment are located in near [sic] Salt Lake City [Woods Cross] and in San Leandro, California. those two plants have been closed for over three years, and there has been virtually no interest on the part of any buyers in those two plants.
>
> As part of Mr. Brown's letter of intent, he has asked for an option on those two plants, but <u>what we're really talking about are the Compton and the Portland facilities</u>." (Tr. at 4, emphasis added).

APPENDIX D

Likewise, counsel for the FTC stated:

> The extension is necessary to allow the trustee time to execute a purchase agreement with a prospective buyer whom he has identified, and who has submitted a letter of intent for two of the four plants required to be divested under the final judgment. (Transcript at 19, emphasis added).

It is clear to this Court that at the June 13, 1984 hearing, both the Trustee and the FTC were seeking an extension of time in which to complete negotiations as to the Compton, California and Portland, Oregon plants only. Further, the Consent Decree specifically provides that "[t]he term of the trust (including any extensions thereof as provided above) shall apply to each plant individually, not the plants jointly." (Consent Decree at IV(B)) Thus, the Court finds that the June 14, 1985 extension of time applied to only the Compton and Portland plants.

APPENDIX D

It is therefore,

ORDERED that the motion made by Owens-Corning Fiberglas for a declaration that the divestiture obligations imposed by the July 23, 1984 Consent Decree have no terminated, is found not well taken and same is denied,

FURTHER ORDERED that the June, 1985 extension of time applied to only the Compton, California and Portland Oregon plants. Owens-Corning Fiberglas is therefore relieved of any obligation to divest the Woods Cross, Utah and San Leandro, California plants.

NICHOLAS WALINSKI
UNITED STATES DISTRICT JUDGE
Toledo, Ohio.
September 12, 1985

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE FEDERAL TRADE
COMMISSION
Plaintiff

-v-

OWENS-CORNING FIBERGLAS
CORPORATION
Defendant

CASE NO. C84-7635

JUDGE SAM H. BELL

O R D E R

This matter is presently before the court on a motion for a thirty-day time extension submitted by a trustee appointed pursuant to a final judgment entered in this case on July 27, 1984. The trustee, Louis Klein, Jr., was appointed by the court on August 29, 1984 for the purpose of divesting four

asphalt shingle plants owned by defendant Owens-Corning Fiberglas Corporation (Owens-Corning) in accordance with the terms of the final judgment.

Pertinent to the resolution of this motion is Article VI(B) of the final judgment which provides:

> The Trustee shall have nine (9) months, commencing from the day following appointment of the Trustee, to find a prospective acquirer or prospective acquirers of the plants, except that such period may be extended by this court for an additional period of time if the Trustee represents that negotiations are ongoing that are likely to lead to the execution of a purchase agreement. Any extension of time granted under this Paragraph in order to complete ongoing negotiations with a prospective acquirer shall be limited to that period necessary to execute a purchase agreement and in no event shall be longer than thirty (30) days. Any delays in divestiture of the plants caused by OCF shall extend the time for divestiture in accordance with the

APPENDIX E

delay caused.

Mr. Klein was appointed by the court on August 29, 1984. He submitted a motion for a thirty-day extension of time on May 30, 1985 based on negotiations with a prospective purchaser and his financial sources which, in the trustee's view, were likely to lead to the execution of a purchase agreement.

The Federal Trade Commission (F.T.C.) submitted a memorandum in support of the motion, while Owens-Corning submitted several memoranda in opposition. The parties argued their positions at a hearing before the court on June 13, 1985.

The two central issues are whether the motion was timely filed and whether the conditions of Article VI(B) are

otherwise met. On the basis of the language contained in the four corners of the final judgment, United States v. Armour & Co., 402 U.S. 673, 681 (1971); United States v. Combustion Engineering, Inc., 364 F.Supp. 181, 184 (D. Conn. 1972), this court finds that both issues must be resolved in favor of granting the time extension.

There is no exact statement in Article VI(B) as to when the nine-month period expires. It is specific, however as to when it begins, the day after the trustee was appointed, or August 30, 1984. The motion was filed on May 30, 1985. It is too hypertechnical to say that it was not filed within the nine months provided by Article VI(B).

It is also important to note that the

trustee has stated by motion and at the hearing that he is conducting ongoing negotiations which he represents as being likely to lead to a purchase agreement. These are the conditions set out in the final judgment which must be mit in order to grant the extension. While it is true that no formal offer has been received and that the prospect has been interested in a purchase for some time, this court finds that deference should be given to the trustee's representations. Accordingly, his motion for extension of thirty days is hereby granted.

In order to avoid any further confusion, the exact date of the expiration of this extension must be addressed. The trustee and F.T.C. urge the court to grant thirty days from the

date of this order while Owens-Corning takes the position that the thirty days should run form the expiration of the nine-month period.

Article VI(B) provides for the extension "limited to that period necessary to execute a purchase agreement and in no event shall (it) be longer than thirty (30) days." This language is explicit and requires that the nine-month period be extended by no more than thirty days. This period ends on June 29, 1985. There is no reason for the court to extend this period beyond the terms agreed to by the parties. The court cannot find that Owens-Corning caused a purposeful delay by opposing the motion for time extension. This interpretation should not prejudice the prospective sale in

that the purchaser has had the benefit of the entire period since May 30. 1985 to arrange his finances.

Accordingly, it is the order of the court that the trustee's motion for extension of time is granted. The thirty-day extension runs to and including June 29, 1985.

IT IS SO ORDERED.

SAM H. BELL

U.S. District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

The Federal Trade Commission,
Plaintiff

-against-

Owens-Corning Fiberglas Corporation,
a Delaware corporation,
Defendant.

Civil Action No. C 84-7635
Final Judgment

Plaintiff, Federal Trade Commission, having filed its Complaint herein on July 27, 1984, and plaintiff and defendant, by their respective attorneys, having consented the entry of this Final Judgment and without this Final Judgment constituting evidence or admission by any party with respect to any issue of fact or law herein:

APPENDIX F

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendant under Section 5(1) of the Federal Trade Commission Act, as amended 15 U.S.C. Sec. 45(1).

II.

As used in this Final Judgment:

APPENDIX F

A. "OCF" mean Owens-Corning Fiberglas Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with principal offices at Fiberglas Tower, Toledo, Ohio 43659, and its successors and assigns.

B. "Final Order means the Final Order of the Federal Trade Commission in Docket No. C-3061, issued on March 30, 1981, which is Exhibit 1 to this Final Judgment.

C. "Plant" shall have the meaning given that term in the Final Order.

D. "Asphalt roofing products" shall

have the meaning given that term in the Complaint of the Federal Trade Commission in Docket No. C-3061, issued on March 30, 1981, which is Exhibit 2 to this Final Judgment.

E. "Person" means any individual, partnership, association, firm, corporation, proprietorship, joint venture, trust or other legal or business entity.

F. "Commission" means the Federal Trade Commission.

III.

Entry of this Final Judgment is in the public interest.

APPENDIX F

IV.

Defendant waives any claims under the Equal Access to Justice Act, 28 U.S.C. Sec. 2412, arising out of this action.

V.

A. This Court shall appoint a Trustee to divest the plants in accordance with the terms of this Final Judgment.

B. The commission shall nominate a person, subject to the prior approval of OCF, which shall not unreasonably be withheld, to serve as Trustee. The nominee of the Commission shall have experience and expertise with acquisitions and sales of manufacturing facilities. This Court shall

appoint as Trustee the person nominated by the Commission and approved by OCF.

C. The Trustee shall be entitled to serve without giving bond or other security and to use its best judgment in performing the duties imposed by this Final Judgment or by law and shall be exempt from personal liability, to the extent permitted by law, for any action taken or not taken in good faith.

D. If the Trustee, for any reason, fails or ceases to act, this Court, upon application by either party, shall appoint a successor Trustee to fulfill the remaining duties and obligation of the Trustee under this Final Judgment and who shall have all powers, rights, and

limitations conferred or imposed by this Final Judgment, and the Court may make such orders as may be necessary and appropriate to enable the successor Trustee to fulfill such duties and obligations.

VI.

A. The Trustee's duty shall be to divest the plants, separately, or in any combination, in accordance with the terms of this Final Judgment, as quickly as reasonably possible, to an acquirer or acquirers approved in advance as provided in this Paragraph VI.

B. The Trustee shall have nine (9) months, commencing from the day following appointment of the Trustee, to find a

prospective acquirer or prospective acquirers of the plants, except that such period may be extended by this Court for an additional period of time if the Trustee represents that negotiations are ongoing that are likely to lead to the execution of a purchase agreement. Any extension of time granted under this Paragraph in order to complete ongoing negotiations with a prospective acquirer shall be limited to that period necessary to execute a purchase agreement and in no event shall be longer than thirty (30) days. Any delays in divestiture of the plants caused by OCF shall extend the time for divestiture in accordance with the delay caused.

C. At any time during the term of the Trust, the Trustee may submit to the

Commission for approval one or more offers to acquire the plants, or any one or more of the , together with the statement required by Subparagraph VI(F). In making its submissions, the Trustee may use its discretion in order to review a sufficient number of prospective acquirers to obtain, as quickly as reasonably possible, the best possible price for the plants, or any one of them, as provided in Subparagraph VI(H).

D. At any time during the period set out in the Commission's Rules for public comment on the application of the proposed acquirer, and at such other times as may be allowed by the Commission, OCF may provide information and written comments to the Commission. The submissions of the prospective acquirer and the Trustee, any

information and comments that may be filed by OCF or the public, and information that may be placed on the record by the Commission shall constitute the record upon which the Commission will determine whether to approve a prospective acquirer. Within ninety (90) days after the Trustee submits a proposed acquirer for approval, the Commission shall inform in writing the Court, OCF and the Trustee whether it approves the prospective acquirer.

E. If OCF objects to the Commission's decision to approve any proposed acquirer, OCF may within fifteen (15) days of receiving notification of the decision petition this Court, and the Court shall make an independent de novo determination, based upon the record created before the

APPENDIX F

Commission and any response to OCF's petition that may be filed by the Commission, whether the proposed acquirer will be approved or disapproved.

F. A proposed acquirer shall be approved by the Commission or, if upon petition by OCF, this Court, only if divestiture to the proposed acquirer will further the remedial purposes of the Federal Trade Commission's Complaint and Final Order in Docket No. C-3061 (attached as Exhibits 1 and 2 to this Final Judgment) and the proposed acquirer has the capacity and intent to operate the plant or plants to be acquired as a facility for the manufacture of asphalt roofing products. In determining whether to approve a proposed acquirer, the following factors, among other

considerations that may be relevant to the acquirer's capacity and intent, and to the furtherance of such remedial purposes, shall be taken into account:

1. whether the competitive effects of divestiture to the proposed acquirer are likely to satisfy the remedial purposes of the Commission's Complaint and Final Order in Docket No. C-3061, provided, however, that neither the Commission nor the Court shall take into account a comparison of the effects on competition of divestiture to any other person;

2. the financial capability of the proposed acquirer to operate the acquired plant or plants to manufacture asphalt roofing products;

APPENDIX F

3. the technical and marketing capability of the proposed acquirer to operate the acquired plant or plants to manufacture and sell asphalt roofing products; and

4. the intent of the proposed acquirer to operate the acquired plant or plants to manufacture asphalt roofing products.

In order to enable the Commission and, if appropriate, the Court, to assess factors (2)-(4) above, the proposed acquirer as a condition of approval under this Paragraph VI shall submit for the record a statement setting forth facts in support of its financial capability, technical and marketing capability, and intent to operate the acquired plant or plants to manufacture

asphalt roofing products, including a business plan for the production and marketing of asphalt roofing products produced at the plant or plants. In assessing the technical and marketing capabilities of a prospective acquirer that would be a new entrant into the production and sale of asphalt roofing products, the Commission and Court may take into account the prospective acquirer's ability to obtain future technical and marketing capabilities.

G. Within one (1) week after appointment of the Trustee, OCF will transfer to the Trustee all powers and authorities necessary to divest the plants, provided, however, that if at the time of the entry of this Final Judgment, OCF has entered

into a purchase agreement or agreements with one or more prospective acquirers, OCF may reserve the nonexclusive power to divest such plant or plants to such prospective acquirer or acquirers.

H. The Trustee shall use its best efforts to obtain the best possible price or prices of the plants, provided, however, that the Trustee shall not be required to obtain a minimum price.

I. The Trustee shall have no obligation or authority to operate the plants.

VII.

A. The Trustee shall perform at the expense of OCF and be compensated in the

following manner:

1. The Trustee shall be paid a flat fee, but in no event more than one hundred thousand dollars ($100,000), the amount to be fixed, with the approval of the Court, at the time of the Trustee's appointment. This amount shall be payable one-ninth per month commencing thirty (30) days after the appointment of the Trustee, except that if the trust shall terminate or the last plant shall be sold before the full amount provided hereunder is paid, all amounts still outstanding shall immediately become due.

2. If, at the time of the termination of the trust or of the closing of the sale of the last of the plants, whichever occurs first, the aggregated

APPENDIX F

amount of the prices paid for the plants is less than five million dollars ($5,000,000), the Trustee shall be paid, in addition to the amount provided in Subparagraph 1, an amount equal to two percent (2%) of the aggregated purchase prices.

3. If, at the time of the termination of the trust or of the closing of the sale of the last of the plants, whichever occurs first, the aggregated amount of the prices paid for the plants is in excess of five million dollars ($5,000,000), the Trustee shall be paid, in addition to the amount provided in Subparagraph 1, an amount equal to one hundred thousand dollars ($100,000) plus one percent (1%) of the aggregated purchase prices in excess of

APPENDIX F

five million dollars ($5,000,000). All amounts then outstanding and due the Trustee shall be payable at the time of the termination of the trust or the closing of the sale of the last plant, whichever occurs first, unless otherwise provided by this Final Judgment. Provided, however, that if pursuant to a reservation of power under Subparagraph VI(G) OCF has entered into a purchase agreement or agreements with one or more prospective acquirers prior to the entry of the Final Judgment and ultimately divests such plant or plants to such acquirer or acquirers, the sale price of such plant or plants shall not be included in the aggregated purchase prices under Subparagraphs 2 and 3 of this

APPENDIX F

Subparagraph and, furthermore, if all the plants are so divested, the Trustee shall not be entitled to compensation under Subparagraph 1.

B. The Trustee shall have authority to retain such consultants, attorneys, investment bankers, business brokers, accountants, appraisers or other representatives as are reasonably necessary to assist in the divestiture of the plants. Reasonable expenses for such services and other ordinary and necessary expenses of the Trustee shall be submitted to this Court for approval and payment by OCF, provided, however, that in no event shall OCF be obligated to pay total expenses in excess of fifty thousand dollars ($50,000) for expenses other than legal expenses.

APPENDIX F

C. OCF shall indemnify the Trustee and hold it harmless against any losses, claims, damages or liabilities to which the Trustee may become subject arising in any manner out of or in connection with the Trustee's duties under the Final Judgment unless this Court determines that such losses, claims, damages or liabilities arose out of the misfeasance, negligence, gross negligence, or the willful or wanton acts or bad faith of the Trustee.

D. OCF shall, under the protection of a protective order of this Court, provide such information an assistance relating to the plants as reasonably may be requested by the Trustee. Such assistance shall include, but not be limited to, providing written information and data relating to

the plants, allowing access to the plants, allowing access to records relating to the plants, providing personnel for tours and inspections of the plants, and providing personnel for answering questions about the plants. OCF shall not take any action to interfere with or impede the Trustee's duties and obligations under this Final Judgment.

E. The Trustee shall have access to all information and data previously provided by OCF to the Commission relating to prior efforts to divest the plants.

F. Pending the divestitures required by the Final Judgment, OCF shall not cause, and shall use its best efforts to prevent, the deterioration of the plants in a manner

that impairs the marketability of any such plants, normal wear and tear excluded. OCF may, but shall not be required to, make capital expenditures for the improvement of the plants. Nothing in this Final Judgment shall prevent OCF from operating or furloughing employees at the plants in a manner consistent with normal business practice, comparable to the manner in which it operates or furloughs at its other asphalt roofing plants, pending the divestitures required by this Final Judgment.

VIII.

A. All sale proceeds shall be paid to the Trustee upon closing. Pending distribution of the sale proceeds, the Trustee shall

deposit the same in an interest bearing account.

B. After approval by this Court of the Trustee's account and payment of fees and expenses to the Trustee, any remaining monies, including any interest thereon, shall be paid to OCF.

IX.

A. Counsel and retained experts for OCF shall have the opportunity, subject to the provision of an appropriate protective order entered by this Court, to review all information in the record created for any proposed acquirer pursuant to Subparagraphs VI(D) and VI(F). Subject to the approval of this Court, Counsel and retained experts

for OCF shall have the right to request additional information from any proposed acquirer.

B. The closing(s) shall be held at a place and time determined by the Trustee. OCF will execute special warranty deeds transferring the real estate with marketable title, subject to easements and restrictions of record and taxes not yet due or payable. Title to personal property will be transferred on an "as is, where is" basis, subject to the provisions of Subparagraph VII(F). OCF shall do nothing to create liens or encumbrances against the plants during the term of the trust.

C. Upon the divestiture of the plants, or upon the expiration of the time period as provided in Subparagraph VI(B), the Trust

shall automatically terminate, and OCF shall be completely relieved of all further divestiture requirements under this Final Judgment and the Final Order, except as provided in Paragraph XII.

D. The term of the Trust (including any extensions thereof as provided above) shall apply to each plant individually, not the plants jointly.

X.

None of the plants shall be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of OCF,

or to anyone who owns or controls, directly or indirectly, more than one percent (1%) of the outstanding shares of the capital stock of OCF.

XI.

Within forty-five (45) days from the effective date of this Final Judgment and every sixty (60) days there after until the Trust shall have terminated (as provided in Subparagraphs VI(B) and IX(C)), the Trustee shall submit a verified report in writing to this Court, with copies to the Commission and to OCF, setting forth (a) a specification of the steps taken by the Trustee to make public the availability for purchase of the plants, (b) a list of all persons or organization to whom notice of

availability for purchase has been given, (c) a summary of all discussions and negotiations together with the identities and addresses of all interested persons or organizations, and (d) copies of all internal memoranda, offers, counter-offers, communications and correspondence concerning said divestiture. Such information shall be kept confidential and shall be so marked. Additionally, the Trustee shall provide such other reports of efforts to divest the plants as may be required by this Court.

XII.

In the event OCF, as a result of the enforcement of a bona fide lien, mortgage, deed or trust or other form of security,

reacquires possession of any of the divested plants, OCF shall so notify plaintiff within thirty (30) days of such repossession, and within one (1) year thereafter shall divest the reacquired plant or plants in accordance with terms and conditions set by this Court, provided, however, that nothing herein shall obligate OCF to provide financing for the divestiture of any or all of the plants.

XIII.

OCF shall pay to the United States Treasury a civil penalty of eight hundred thousand dollars ($800,000) within seven (7) days after the entry of this Final Judgment.

APPENDIX F

XIV.

This Court retains jurisdiction of this matter and may issue at any time such further orders and directions consistent with this Final Judgment as requested by the plaintiff, defendant or the Trustee, as may be necessary and appropriate for the construction of any of the provision of this Final Judgment, for the enforcement of the compliance with this Final Judgment, or for the punishment of violation of this Final Judgment. The Court may also issue such orders and directions consistent with this Final Judgment as requested by the Trustee as may be necessary and appropriate to accomplish the divestiture of the plants.

APPENDIX F

XV.

Nothing in this Final Judgment, or any order or direction hereunder, shall require OCF to supply and materials or services, other than saturant and/or coating asphalt, to any actual plant purchases, or shall prohibit OCF from acting in a lawful competitive manner. If, upon application by the Trustee, this Court determines that divestiture of one or more of the plants can only be accomplished if OCF sell saturant and/or coating asphalt to the plant purchaser, OCF shall sell saturant and/or coating asphalt to the plant purchaser for use in manufacturing this asphalt roofing products from the adjacent OCF asphalt plant (of the OCF Martinez asphalt plant in the case of the San

Leandro plant) for a maximum period of eighteen (18) months from the date of the closing of the sale of the plant or plants so divested. The terms of such sales shall be the standard terms and conditions of sale of OCF's Trumbull Asphalt division (attached as Exhibit 3) at OCF's going price in effect at time of shipment.

XVI.

Except as expressly provided herein, nothing in this Final Judgment alters defendant's obligation to comply with the order of the Commission in Docket No. C-3061.

XVII.

APPENDIX F

This Final Judgment shall be in effect until December 31, 1987, at which time this Final Judgment shall automatically terminate.

SO ORDERED:

Nicholas J. Walinski

United States District Judge

CONSENTED TO:

FEDERAL TRADE COMMISSION

BY: Selig S. Merber
Deputy Assistant Director

Robert B. Greenbaum
Lucy Prashker

Attorneys for the
Federal Trade Commission

Of counsel:

Timothy J. Muris
Director
Barbara A. Clark

APPENDIX F

Deputy Director
Elliot Feinberg
Assistant Director
Bureau of Competition
Federal Trade Commission

OWENS-CORNING FIBERGLAS CORPORATION

BY: W.W. Boeschenstein
Chairman of the Board,
President and Chief
Executive Officer,
Owens-Corning Fiberglas
Corporation

James T. Halverson
Attorney for Owens-
Corning Fiberglas
Corporation
Sherman & Sterling
53 Wall Street
New York, New York 10005

IN THE MATTER OF

OWENS-CORNING FIBERGLAS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3061. Complaint, March 30, 1981—Decision, March 30, 1981

This consent order requires, among other things, a Toledo manufacturer of glass fiber products, including glass fiber-based asphalt roofing products, to divest to a Commission-approved buyer within 24 months from the effective date of the order, the four specified asphalt roofing plants acquired from the Lloyd A Fry Roofing Company in 1977. Further, should the company decide to sell the Trumbull asphalt refinery located adjacent to each divested plant, during the ten-year period following the divestiture, it is required, in certain circumstances, to give the owner of the roofing plant the right of first refusal to purchase. Additionally, the firm is barred for ten years, from acquiring without prior Commission approval, any interest in an asphalt roofing plant located in the "Western Market."

Appearances

For the Commission: *David W. Long.*

For the respondent: *James T. Halverson* and *Gregory Bentley, Shearman & Sterling*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Owens-Corning Fiberglas Corporation ("OCF"), a corporation subject to the jurisdiction of the Commission, has violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)(1)), through the acquisition of certain assets of Lloyd A. Fry Roofing Company ("Fry") and that a proceeding in respect thereof is in the public interest, hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Asphalt roofing products* means saturated felt, roll roofing and

asphalt shingles. *Asphalt roofing products* specifically excludes accessory items such as asphalt cements, adhesives, primers and mineral granules.

(b) *Saturated felt* consists of a dry felt base, made from rags, wood and other cellulose fibers or from glass fiber or asbestos, which is saturated, coated, or impregnated with an oxidized asphalt or tar saturant, but is otherwise untreated.

(c) *Roll roofing* is made from saturated felt by applying an additional coating of more viscous, weather-resistant oxidized asphalt. *Roll roofing* may be either mineral or smooth surfaced. *Roll roofing* includes, *inter alia*, the products known as *cap sheets* and *base sheets*.

(d) *Asphalt shingles* are mineral-surfaced roll roofing which have been machine-cut into rectangular strips or other shapes.

(e) The *Western market* consists of the states of California, Oregon, Washington, Arizona, Nevada, Utah and Idaho.

II. OWENS-CORNING FIBERGLAS CORPORATION

2. Respondent OCF is a corporation organized under the laws of the State of Delaware, with its principal place of business at Fiberglas Tower, Toledo, Ohio.

3. OCF is the nation's largest manufacturer of glass fiber products, including glass fiber insulation and glass fiber-based asphalt roofing products, bathroom fixtures, non-corrosive tanks, and large diameter glass fiber-reinforced tanks. In fiscal year 1979, OCF had consolidated net revenues of approximately $2.26 billion and consolidated net income of approximately $109 million.

4. At all times relevant hereto, OCF sold and shipped asphalt roofing products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

III. LLOYD A. FRY ROOFING COMPANY

5. Fry was a corporation organized under the laws of the State of Delaware, with its principal place of business at 5818 Archer Road, Summit, Illinois. Prior to the acquisition, Fry was the nation's largest privately-held manufacturer of asphalt roofing products.

6. At all times relevant hereto, Fry sold and shipped asphalt roofing products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and

engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. THE ACQUISITION

7. On or about April 20, 1977, OCF acquired certain assets, including the asphalt roofing products assets, of Fry and two of its subsidiaries for approximately $101 million. Post-acquisition adjustments raised the final purchase price to approximately $108 million.

V. TRADE AND COMMERCE

8. Asphalt roofing products constitute a competitively significant line of commerce, or market.

9. The Western market is a relevant geographic market for the manufacture and sale of asphalt roofing products.

10 The Western market is substantially concentrated, with the four largest sellers accounting for approximately 57 percent and the eight largest sellers accounting for approximately 87.2 percent of asphalt roofing products sales in 1977.

VI. COMPETITION

11. Prior to the acquisition, OCF and Fry were substantial actual competitors in the manufacture and sale of asphalt roofing products in the Western market.

VII. EFFECTS OF THE ACQUISITION

12. The effects of the acquisition include but may not be limited to the following:

(a) actual competition between OCF and Fry in the sale of asphalt roofing products was eliminated;

(b) actual competition between competitors generally in the sale of asphalt roofing products may be lessened;

(c) Fry was eliminated as an actual substantial independent competitor in the sale of asphalt roofing products; and

(d) concentration in the Western market was increased substantially, diminishing the possibilities for eventual deconcentration of that market.

VIII. VIOLATIONS CHARGED

13 The effect of the acquisition of Fry by OCF may be substan-

tially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

14. The acquisition of Fry by OCF constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Pertschuk did not participate.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of certain assets of Lloyd A. Fry Roofing Company by Owens-Corning Fiberglas Corporation ("OCF") and OCF having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge OCF with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act; and

OCF, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by OCF of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by OCF that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that OCF has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

ORDER

For the purpose of this Order the following definitions shall apply:

1. *OCF* means Owens-Corning Fiberglas Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices at Fiberglas Tower, Toledo, Ohio, and its successors and assigns.

2. *Fry* means Lloyd A. Fry Roofing Company, certain assets of

which (as well as certain assets of Trumbull Asphalt Company of Delaware and Summit Wholesale Supply Company) were acquired by OCF pursuant to an agreement dated April 20, 1977.

3. *Plant* means all properties and assets acquired and received from Fry, consisting of all real and personal property described in Paragraphs 4.8 and 4.9 of the Sale of Assets Agreement dated April 20, 1977, among OCF, Fry, Trumbull Asphalt Company of Delaware and Summit Wholesale Supply Company and in Exhibits F-H to such agreement, together with all additions and improvements thereto, that are located at:

(a) Compton, California;
(b) Portland, Oregon;
(c) San Leandro, California; and
(d) Woods Cross, Utah;

provided, however, that the term *Plant* does not include those assets or properties disposed of by OCF in the ordinary course of the business of operating or renovating such facilities for the manufacture of asphalt roofing products; and *provided further* that the term *Plant* does not include such properties or assets as would otherwise be deemed part of the Plant where the Eligible Person acquiring the Plant elects, in its sole discretion, but subject to the approval of the Commission, not to acquire those properties or assets; and *provided further* that the term *Plant* shall include only the land, properties and assets so acquired and received from Fry as are approximately indicated as within the areas bounded by solid red lines on the attached maps.

4. *Person* means any individual, corporation, partnership, joint venture, trust, unincorporated association, or other business or legal entity.

5. *Asphalt Facility* means a plant operated by OCF's Trumbull Asphalt Division, which produces *inter alia* oxidized roofing asphalt.

6. *Asphalt Roofing Plant* means a plant primarily engaged in the manufacture of *asphalt roofing products* as such products are defined in Paragraphs I(1)(a)-(d) of the Complaint.

7. *Eligible Person* means any Person approved by the Commission. No Person shall be considered for status as an Eligible Person unless the Commission is satisfied that the Person has the capacity and intention to operate the Plant(s) to be acquired as a facility or facilities for the manufacture of asphalt roofing products.

8. *Divest* means any act by which OCF sells, transfers, conveys or relinquishes ownership, possessory interest and control of the Plants.

I.

It is ordered, That within twenty-four (24) months of the effective date of this Order OCF shall Divest the Plants subject to the terms of this Order. The Plants may be Divested either separately or in any combination.

II.

It is further ordered, That the divestitures of the Plants shall be made only to one or more Eligible Persons and that OCF shall submit the proposed divestitures to the Commission for its prior approval.

III.

It is further ordered, That pending the divestitures required by this Order, OCF shall not cause, and shall use its best efforts to prevent, the deterioration of the Plants in a manner that impairs the marketability of any such Plants, normal wear and tear excluded. OCF may, but shall not be required to, make capital expenditures for the improvement of the Plants. Nothing in this Order shall prevent OCF from operating or furloughing employees at the Plants in a manner consistent with normal business practice, comparable to the manner in which it operates or furloughs at its other Asphalt Roofing Plants, pending the divestitures required by this Order.

IV.

It is further ordered, That if, at any time during the ten (10) years following the divestiture of each Plant, OCF desires to sell the Asphalt Facility located adjacent to such Plant to a third-party not owned directly or indirectly more than 5% by OCF, then OCF shall, after reaching agreement with such third-party as to the price, terms and conditions to be included in the contract of sale between such third-party and OCF but prior to executing such contract of sale, first offer to sell such Asphalt Facility to whichever Person then owns such Plant for the same price, and upon the same terms and conditions, as are shown in such proposed contract of sale with such third-party; *provided further*, that for the purposes of this Paragraph "OCF" shall include any subsidiary in which the voting stock is more than 50 percent owned directly or indirectly by OCF.